Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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Leadership is a behavior, not a position

U.S. SUPREME COURT CASE LAW SUMMARIES

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Commissioner

Department of
CRIMINAL JUSTICE TRAINING
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2008-08 Term
U.S. Supreme Court

Danforth v. Minnesota
--- U.S. --- (2008)
Decided February 20, 2008

FACTS: In 1996, Danforth was convicted of criminal sexual conduct with a six year old child. The child did not testify, but instead, the jury "saw and heard a videotaped interview of the child." Danforth was convicted and appealed. Eventually, the Minnesota Supreme Court affirmed his conviction. Danforth's opportunity to appeal further was foreclosed by the expiration of the time limit.

However, in 2004, the Court decided Crawford v. Washington,[1] announcing the decision as a "'new rule' for evaluating the reliability of testimonial statements in criminal cases." Crawford held that the "only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." As a result, Danforth filed for a "state postconviction petition" - arguing that the admission of the taped interview violated the rule announced in Crawford. Minnesota, applying the Teague[2] rule, concluded that the state courts were not required to apply Crawford retroactively. Danforth appealed, and the U.S. Supreme Court accepted certiorari, however, "to consider whether Teague or any other federal rule of law prohibits [the state courts] from doing so."

ISSUE: May states make the Crawford rule retroactive in state proceedings, even though it is not retroactive under federal law?

HOLDING: Yes

DISCUSSION: At the outset, the Court noted that the passage of the Fourteenth Amendment, in 1868, applied the provisions of the Bill of Rights to the states. Over the years since, the Court addressed various cases concerning the Sixth Amendment, including the "basic … right of confrontation." With respect to retroactive application, however, the Court found it necessary to determine "whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought." The "serial incorporation of the Amendments in the Bill of Rights during the 1950's and 1960's imposed more constitutional obligations on the States and created more opportunity for claims that individuals were being convicted without due process and held in violation of the Constitution." Until 1965, however, the Court construed "every constitutional error, including newly announced ones, as entitling state prisoners to relief on federal habeas." In that year, however, the Court ruled that "the retroactive effect of each new rule should be determined on a case-by-case basis by examining the purpose of the rule, the reliance of the States on the prior law, and the effect on the administration of justice of retroactive

[1] 541 U.S. 36 (2004).
[2] Teague v. Lane, 489 U.S. 288 (1989).

application of the rule."[3] Finally, in Teague, the Court ruled that retroactivity would not be the general rule, and that new rules would not be applied to "those cases which have become final before the new rules are announced." One of only two exceptions to that general rule would be for "'watershed' rules that 'implicate the fundamental fairness of the trial.'"

This decision, however, did not address whether the States might "provide remedies for a broader range of constitutional violations than are redressable on federal habeas." In some cases following upon this decision, the state courts chose to give retroactive effect to various federal decisions.

The Court concluded that its precedent did "not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under Teague."

The Court ruled that Minnesota was "free to reinstate its judgment disposing of the petition for state postconviction relief."

Virginia v. Moore
--- U.S. --- (2008)
Decided April 23, 2008

FACTS: On February 20, 2003, officers from Portsmouth (VA) stopped Moore. They had heard, via the radio, "that a person known as 'Chubs' was driving with a suspended license." The officers knew that Moore used that nickname and verified that Moore's license was, in fact, suspended. They arrested Moore for the offense and during the search incident to the arrest, they discovered that he was in possession of 16 grams of crack cocaine and a large amount of cash. They charged him with the drug offense.

However, under Virginia law, the arrest was not valid, as Virginia law required the issuance of a summons rather than a custodial arrest under the specific circumstances with which they were faced. Moore argued for suppression, which was denied. He was convicted at trial, but that conviction was overturned by Virginia's appellate court. The arrest was eventually found to be invalid by the Virginia Supreme Court, which ruled that the arrest and search violated the Fourth Amendment. The evidence found subsequent to the arrest was suppressed.

Virginia requested certiorari and the U.S. Supreme Court accepted the case.

ISSUE: Is an arrest made upon probable cause unlawful under federal law if the state in which the arrest is made would not permit the arrest on other grounds?

HOLDING: No

DISCUSSION: After reviewing the history of the Fourth Amendment in respect to arrest, the Court noted that:

[3] Linkletter v. Walker, 381 U.S. 618 (1965).

> In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.

Although, the Court stated that states are "free 'to impose higher standards on searches and seizures than required by the Federal Constitution,'" that whether a particular action is valid "within the meaning of the Fourth Amendment" has never been dependent "on the law of the particular State in which the search occurs."

The Court acknowledged that "Virginia chooses to protect individual privacy and dignity more than the Fourth Amendment requires, but it also chooses not to attach to violations of its arrest rules the potent remedies that federal courts have applied to Fourth Amendment violations." As an example, evidence from such arrests is not usually excluded from trial. The Court looked to its earlier ruling in Atwater v. Lago Vista[4], and found that because of the "need for a bright-line constitutional standard," it would uphold the general rule of probable-cause arrests even to minor misdemeanor cases. Further, it stated that "[i]ncorporating state-law arrest limitations into the [U.S.] Constitution would produce a constitutional regime no less vague and unpredictable than the one [the Court] rejected in Atwater."

The Court accepted that "linking Fourth Amendment protections to state law would cause them to 'vary from place to place and from time to time[5]: and that doing so would also cause confusion "if federal officers were not subject to the same statutory constraints as state officers." The Court concluded "that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution and that while States are free to regulate such arrests however they choose, state restrictions do not alter the Fourth Amendment's protections."

Moore also argued that even if the arrest was lawful, that the subsequent search was not. The Court noted, however, that it had "recognized … that officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence."[6] The Court agreed that it "equated a lawful arrest with an arrest based upon probable cause" even though state law may define that differently. Since the officers in this case actually placed Moore in physical arrest and custody, they faced the same risks that any other officers making an arrest might encounter. As such, the Fourth Amendment does not demand the exclusion of the evidence in this case.

The Virginia Supreme Court decision was reversed, and the case remanded for further proceedings.

NOTE: To emphasize, this case held that the arrest, and the subsequent search, could not be overturned on Fourth Amendment (federal) grounds. This leaves open the argument that the arrest and subsequent search might be ruled unlawful on state grounds. Logically, if the arrest is overturned on state grounds as an invalid arrest, the arrested party would also not be successful in filing a federal lawsuit under 42 U.S.C. §1983 on the grounds of an unlawful arrest and/or search.

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[4] 532 U.S. 318 (2001).
[5] Quoting from Whren v. U.S., 517 U.S. 896 (1996).
[6] See U.S. v. Robinson, 414 U.S. 218 (1973).

U.S. v. Williams
--- U.S. --- (2008)
Decided May 19, 2008

FACTS: On April 26, 2004, Williams, "using a sexually explicit screen name, signed in to a public Internet chat room." A Secret Service agent, also signed into the same chat room, noticed a message, ultimately from Williams, that said "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The two "struck up a conversation" which led to an "electronic exchange of nonpornographic pictures of children." Williams then sent the agent a message "that he had photographs of men molesting his 4-year-old daughter." He was suspicious, however, that the person he was in communication with was a law enforcement officer, and "demanded that the agent produce additional pictures." When those demanded pictures were not forthcoming, he attached a public message with an uplink that led to "seven pictures of actual children, aged approximately 5 to 15, engaging in sexually explicit conduct and displaying their genitals."

"The Secret Service then obtained a search warrant for Williams's home, where agents seized two hard drives containing at least 22 images of real children engaged in sexually explicit conduct, some of it sadomasochistic."

Williams was charged with pandering child pornography under 18 U.S.C. §2252A(a)(3)(B) and one of possessing child pornography under §2252A(a)(5)(B). He pleaded guilty, preserving, however, the right to a constitutional challenge of the pandering charge. The District Court then separately rejected his challenge. The Eleventh Circuit of the U.S. Court of Appeals, however, found that the statute in question was "both overbroad and impermissibly vague" and reversed that conviction. The Government appealed, and the U.S. Supreme Court granted certiorari.

ISSUE: May an officer charge (under federal law) for pandering (offering or requesting) child pornography even when the actually item may not actually exist?

HOLDING: Yes

DISCUSSION: The Court began its opinion by noting that it had "long held that obscene speech - sexually explicit material that violates fundamental notions of decency - is not protected by the First Amendment."[7] However, the Court agreed that it was also important to "protect explicit material that has social value" and as such, it had "limited the scope of the obscenity exception" and "overturned convictions for the distribution of sexually graphic but nonobscene material."[8] In addition, the Court has addressed the "related and overlapping category of proscribable speech, child pornography."[9] The Court has previously ruled that "a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and that the "government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults."[10]

[7] See Roth v. U.S., 354 U.S. 476 (1957).
[8] Miller v. California, 413 U.S. 15 (1973); Jenkins v. Georgia, 418 U.S. 153 (1974).
[9] Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002); Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).
[10] Stanley v. Georgia, 394 U.S. 557 (1969).

With respect to the statute at issue, the Court noted that the "broad authority to proscribe child pornography is not, however, unlimited." In Ashcroft v. Free Speech Coalition, the Court had found two provisions of the Child Pornography Protection Act (CPPA) of 1996[11] to be "facially overbroad." First, it reversed the provision that that banned the possession and/or distribution of materials that depicted what appears to be minors engaged in sexual activity, even if, in fact, the actors were "only youthful-appearing adults or virtual images of children generated by a computer," since "the child-protection rationale for speech restriction does not apply to materials produced without children." Second, it overturned the provision that "criminalized the possession and distribution of material that had been pandered as child pornography, regardless of whether it actually was that," which meant that someone who was in possession of "unobjectionable material that someone else had pandered" as child pornography could be prosecuted.

Because of that earlier opinion, Congress had revisited the issue and produced the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003.[12] 18 U.S.C. §2252A was modified to add a new provision relating to pandering and solicitation. It is under this new section (referred to as 503[13]) that Williams was charged, and has appealed. The Court concluded that it was obvious in the enactment of this provision that "Congress was concerned that limiting the child-pornography prohibition to material that could be *proved* to feature actual children ... would enable many child pornographers to evade conviction."[14] The Court stated that the "emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children" although at the current time the creation of realistic virtual images is "prohibitively expensive."

The Court first looked at the re-enacted provision to analyze if it was constitutionally overbroad. The Court noted that the statute in question "prohibits offers to provide and requests to obtain child pornography," but does not "require the actual existence of child pornography." The statute has a mental state (scienter) of "knowingly." The "string of operative verbs" listed in the statute can be "reasonably read to have a transactional connotation" and "penalizes speech that accompanies or seeks to induce a transfer of child pornography - via reproduction or physical delivery - from one person to another." The Court concluded this would include both commercial and non-commercial (such as trade, barter or gift) transactions. Further, the revised statute requires both a subjective and objective belief that the material is child pornography, based upon how the material is described. Finally, the conduct depicted must be sexually explicit, rather than suggestive, but might include simulated sexual conduct, and must involve "actual children."

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[11] P.L. 104-208.

[12] P.L. 108-21

[13] The relevant portion of the statute reads:
Any person who--
"(a)
knowingly--
"(3)advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--an obscene visual depiction of a minor engaging in sexually explicit "(i) conduct; ora visual depiction of an actual minor engaging in sexually explicit "(ii) conduct,
"shall be punished as provided in subsection (b)." §2252A(a)(3)(B).

[14] Emphasis in original.

In the second part of the analysis, the court examined whether the statute criminalized "a substantial amount of protected expressive activity." The Act does not prohibit the "abstract advocacy of illegality" - child pornography - only the specific "offers to provide or requests to obtain it." The court found that the "pandering and solicitation made unlawful by the Act are sorts of inchoate crimes - acts looking toward the commission of another crime, the delivery of child pornography" and equated to "other inchoate crimes - attempt and conspiracy, for example - [in which the] impossibility of completing the crime because the facts were not as the defendant believed is not a defense." For this statute to apply, the "defendant must believe that the picture contains certain material, and that material in fact … must meet the statutory definition."

The Court further found that the statute was not so vague as to void it. The Court concluded:

> Child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet. This Court held unconstitutional Congress's previous attempt to meet this new threat, and Congress responded with a carefully crafted attempt to eliminate the First Amendment problems we identified. As far as the provision at issue in this case is concerned, that effort was successful.

The Eleventh Circuit decision was reversed, and the current version of the PROTECT law was upheld.

Rothgery v. Gillespie County, Tx
--- U.S. --- (2008)
Decided June 23, 2008

FACTS: On July 15, 2002, Rothgery was arrested by Gillespie County officers on the charge of being a felon in possession of a firearm. In fact, the record was in error, and Texas did not dispute that Rothgery was not, in fact, guilty of the charge. Because it was a warrantless arrest, Texas law required the officers to take him before a magistrate judge. (Although Texas law does not give a name to this initial appearance, it was referred to as a 15.17 hearing, apparently from the section of the criminal code from which it derives.) During this hearing, the judge looks at the probable cause, sets bail if appropriate and formally informs the subjects of the charges filed against them.

In Rothgery's hearing, the arresting officer submitted a sworn "affidavit of probable cause" that described the facts of the case and placed the charges. The magistrate judge agreed that there was sufficient probable cause to support the arrest, informed Rothgery of the charges, set bail and committed him to jail. He was eventually able to post a surety bond (which appeared to be on the order of a recognizance bond) and was released.

During the initial hearing, Rothgery requested appointed counsel, but was told that appointing counsel would delay the setting of bond. So, Rothgery waived counsel for that hearing. He did, apparently, during the ensuing months, continue to make both "oral and written requests for appointed counsel, which went unheeded." (Texas did not dispute that he had done so.) In January, 2003, Rothgery was indicted on the original charges and rearrested. He was not able to make the increased bail, and spent 3 weeks in jail before being appointed counsel. When counsel was finally appointed, Rothgery got a bond reduction hearing and was again released. The attorney was also able to quickly prove that Rothgery had never

been convicted of a felony, and when the prosecutor was provided with the information, the indictment was dismissed.

Rothgery sued Gillespie County under 42 U.S.C. §1983, claiming that the County violated his Sixth Amendment right to counsel. The County raised, in part, as its defense that it had an "unwritten policy of denying appointed counsel to indigent defendants out on bond until at least the entry of an information or indictment." The U.S. District Court and the Fifth Circuit Court of Appeals upheld the Texas position, finding that the "relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate," and that the "officer who filed the probable cause affidavit at Rothgery's appearance [lacked] any power to commit the state to prosecute without the knowledge or involvement of a prosecutor."

Rothgery requested certiorari, and the U.S. Supreme Court accepted the case.

ISSUE: When does the right to counsel attach in a criminal case?

HOLDING: At the defendant's initial appearance before a judicial officer

DISCUSSION: The Court began its discussion by noting that it had - "for purposes of the right to counsel, pegged commencement to 'the initiation of adversary judicial criminal proceedings - whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[15] The Court continued:

> The rule is not "mere formalism," but recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." The question to be answered in Rothgery is whether Texas's initial hearing before the magistrate "marks that point, with the consequent state obligation to appoint counsel within a reasonable time once a request for assistance is made."

The Court found that the lower Texas state courts had "effectively focused not on the start of adversarial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied." The Court found this to be error. Instead, the Court looked to its decisions in Brewer v. Williams[16] and Michigan v. Jackson,[17] both of which held that the "right to counsel attaches at the initial appearance before a judicial officer." No matter the actual name for that proceeding, it is "generally the hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings,' and 'determine[s] the conditions for pretrial release." Clearly, the 15.17 hearing is an initial appearance.

The Court noted that the "overwhelming consensus practice conforms to the rule that the first formal proceeding is the point of attachment."[18] The Court found that Texas's insistence the "attachment depends not on whether a first appearance has begun adversary judicial proceedings, but on whether the prosecutor

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[15] U.S. v. Gouveia, 467 U.S. 180 (1984); Kirby v. Illinois, 406 U.S. 682 (1972)
[16] 430 U.S. 387 (1977)
[17] 475 U.S. 625 (1986)
[18] Kentucky is in the majority - and RCr 3.05 requires that the defendant be provided access to counsel at the initial appearance. In Kentucky, that is usually within 24-48 hours of the arrest.

had a hand in starting it." The Court found that standard to be wrong, "wholly unworkable and impossible to administer."[19]

The Court stated that:

> It would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps, incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law.
>
> All of this is equally true whether the machinery of prosecution was turned on by the local police of the state attorney generally.

The Court noted that Rothgery alleges that he was unable to find a job after his arrest because potential employers "knew or learned of the criminal charge pending against him." The Court found it fair to assume "that those potential employers would still have declined to make job offers if advised that the county prosecutor had not [yet] filed the complaint."

Finally, Texas -

> "tr[ied] to downplay the significance of the initial appearance by saying that an attachment rule unqualified by prosecutorial involvement would lead to the conclusion 'that the State has statutorily committed to prosecute *every* suspect arrested by the police," given that "state law requires [an article 15.17 hearing] for every arrestee." The answer, though is that the State has done just that, subject to the option to change its official mind later. The State may rethink its commitment at any point; it may choose not to seek indictment in a felony case, say, or the prosecutor may enter *nolle prosequi*[20] after the case gets to the jury room. But without a change of position, a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives.

The Court concluded that its holding in this case was narrowly focused and "merely reaffirm[ed] what [the Court] ha[d] held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." The case was remanded back to the lower courts for further consideration of whether the delay resulted in prejudice to Rothgery.

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[19] On a side note, the Court suggested that police officers are "routinely present at defendants' first appearances" and prosecuting attorneys " are not." In Kentucky, however, the reverse is generally the case, as county attorneys present the cases for initial appearance to the judge, and absent special circumstances, arresting officers are generally not present. In many other states, officers actually take defendants arrested without a warrant immediately before a magistrate judge of some type, a role fulfilled in Kentucky by trial commissioners as quasi-judicial officers, and present, either orally or by sworn statement, their probable cause to support a warrantless arrest.

[20] A formal declaration that there will be no further prosecution of the case.

Giles v. California
--- U.S. ---
Decided June 25, 2008

FACTS: On September 29, 2002, Giles "shot his ex-girlfriend, Brenda Avie, outside the garage of his grandmother's home." No one witnessed the shooting, but "Giles' niece heard what transpired from inside the house." The couple were "speaking in conversational tones" when Avie called for "Granny." Gunshots rang out and both the niece and the grandmother ran outside. They saw Giles standing near Avie's body with a handgun. Avie had been shot a total of six times. Giles fled, and was arrested some two weeks later for murder.

At trial, Giles claimed self-defense, and that Avie had been known to be violent in the past and had made death threats against Giles and his new girlfriend. That day, Avie allegedly made verbal threats against him and he retrieved a gun. As he walked back to talk to her, she "charged at him, and … he was afraid she had something in her hand." He testified that he closed his eyes and fired, and that he did not intend to kill her.

The prosecution "sought to introduce statements that Avie had made to a police officer responding to a domestic-violence report about three weeks before the shooting." At that time, Avie had stated that Giles had accused her of an affair, that he punched and choked her, and that he threatened her with a knife. The statements were entered into evidence against Giles under a California law that permitted the admission of such statements when the declarant was unavailable to testify and when the prior statements are otherwise deemed trustworthy.[21]

Giles was convicted and appealed. During the pendency of his appeal, the case of Crawford v. Washington was decided, which concluded that the Confrontation Clause requires that a defendant have the opportunity to confront the witnesses who give testimony against him except in cases where an exception to the confrontation right was recognized at the time of the founding. The California appellate courts found that the statements were admissible because "Crawford recognized a doctrine of forfeiture by wrongdoing." In other words, by intentionally killing Avie, he forfeitured the right to confront her at trial.

Giles requested certiorari, and appealed.

ISSUE: May testimonial statements made by a deceased subject, some time prior to their murder, be admitted against the suspect in their murder, when there is no evidence the murder was committed to prevent them from testifying against the suspect?

HOLDING: No

DISCUSSION: First, the Court accepted, as did California, that Avie's statements to the officer were testimonial. To decide the case, however, the Court asked "whether the theory of forfeiture by wrongdoing accepted by the California Supreme Court is a founding-era exception to the confrontation right."

[21] The California law essentially incorporated the rule in Ohio v. Roberts, see footnote 23.

The Court had previously accepted "two forms of testimonial statements" as admissible – one being those "declarations made by a speaker who was both on the brink of death and aware that he was dying" and the other being the statements made by a witness "who was 'detained' or 'kept away' by the 'means or procurement of the defendant.'"[22] The Court engaged in a lengthy discussion of the meaning of various terms used in such cases, with the intended purpose to determine whether an intentional murder of the witness was "conduct *designed* to prevent the witness from testifying." From that series of cases, the Court concluded that "[i]n cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying – as in the typical murder case involving accusatorial statements by the victim – the testimony was excluded unless it was confronted or fell within the dying-declaration exception."

The Court concluded that to permit the admission of the statement would, in effect, overrule Crawford and would lead back to the adoption of "an approach not much different from the regime of Ohio v. Roberts.[23] It noted that the "common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them …."

The Court concluded by responding to arguments raised in the dissent in this case, to the effect that modifying Crawford with respect to domestic abuse cases would be "particularly helpful in punishing … abusers." The Court stated that it would not be as "helpful as the dissent suggests, since only *testimonial* statements are excluded by the Confrontation Clause." In other words, "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing." The Court considered that the dissenting justices were insisting upon "one Confrontation Clause (the one the Framers adopted and Crawford described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women." The Court agreed that domestic crimes are intolerable offenses that warrant additional attention from the state legislatures, but noted that "abridging the constitutional rights of criminal defendants is not in the State's arsenal."

The Court agreed, however that:

> The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence might support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testimony.

In those situations, it might be appropriate to admit such evidence, but because the California trial courts did not consider Giles's intent in killing Avie, the Court declined to rule on that aspect of the case. Giles's

[22] The Court cited to a series of old English common law cases dating as far back as 1666.
[23] 448 U.S. 56 (1980)

conviction was vacated, and the case remanded back for further proceedings, including the possibility that his intent in killing Avie was to prevent her from testifying against him.

Kennedy v. Louisiana
--- U.S. --- (2008)
Decided June 25, 2008

FACTS: Kennedy was convicted of an aggravated rape of his 8-year-old stepdaughter. The facts of the criminal case are irrelevant to the summary, except to say that the rape resulted in egregious physical injuries to the child genital area, with the pediatric forensic expert stating that her "injuries were the most severe he had seen from a sexual assault in his … years of practice" and required emergency surgery.

In 1995, Louisiana was among a minority of states that authorized capital punishment for child rape. (In addition, several of those states permitted capital punishment for other nonhomicide crimes.)

Kennedy appealed the death penalty. The Louisiana courts uniformly affirmed the sentence. Kennedy appealed, ultimately, to the U.S. Supreme Court, which granted certiorari.

ISSUE: May an individual convicted of child rape be subjected to the death penalty?

HOLDING: No

DISCUSSION: The Court reviewed the history of the Eighth Amendment with respect, particularly, to capital punishment. In 1972, in Furman v. Georgia, the Court nvalidated most state statutes that had existed prior to that year which authorized the death penalty for rape and other nonhomicide crimes. Following that year, several states, including Louisiana, reenacted its law authorizing capital punishment for all rape, but that was modified to only applying to child rape. (Specifically, six states that authorized the death penalty at all had the death penalty for child rape, and 30 did not) In precedent, the Court had ruled that the death penalty must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[24] Further, in Coker v. Georgia, the Court had ruled that the death penalty was unavailable for the rape of an adult woman.[25]

The Court noted, however, that despite the fact that other states, along with Louisiana, authorized the death penalty, that only Louisiana had, since 1964, sentenced an individual to death for the crime of child rape.[26] In addition, the Court dwelled on the fact that statistics indicated that rape of a child under 12 (child rape) occurred approximately twice as often as first-degree (intentional) homicide. (In Louisiana alone, at the time of the deliberations, there were between 70 and 100 capital rape cases pending.) Even with the suggestion that "narrowing aggravators" could be used to reduce the number of cases eligible for the death penalty, "to ensure the death penalty's restrained application," the Court found it "difficult to identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases

[24] Roper v Simmons, 543 U.S. 551 (2005), regarding juveniles; Atkins v. Virginia (536 U.S. 304 (2002) regarding the mentally retarded.
[25] 433 U.S. 584 (1977)
[26] Kennedy and another individual, Richard Davis, were both sentenced to the death penalty for that crime. However Davis was sentenced in December, 2007, and was not, specifically, a petitioner in this case. Obviously, however, his sentence will also be commuted by the ultimate ruling in this case.

of child rape and yet not imposed in an arbitrary way." The Court also expressed concern that a capital case required a "long-term commitment by those who testify for the prosecution, especially when guilt and sentencing determinations are in multiple proceedings."
The Court noted:

> Society's desire to inflict the death penalty for child rape by enlisting the child victim to assist it over the course of yeas in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice. The way the death penalty here involves the child victim in its enforcement can compromise a decent legal system; and this is but a subset of fundamental difficulties capital punishment can cause in the administration and enforcement of law proscribing child rape.

The Court also recognized that there are "serious systemic concerns in prosecuting the crime of child rape that are relevant" – specifically the "problem of unreliable, induced, and even imagined child testimony means there is a 'special risk of wrongful execution' in some child rape cases." The Court mentioned the studies that concluded that "children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement" – "even on abuse-related questions." Also, the fact that child rape and sexual abuse are believed to be dramatically underreported means that the availability of the death penalty for the crime "may not result in more deterrence or more effective enforcement."

Finally, "by in effect making the punishment for child rape and murder equivalent, the State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim." Although "[e]ach of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape," that "[t]aken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense."

The Court ruled that:

> Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.

District of Columbia v. Heller
--- U.S. --- (2008)
Decided June 26, 2008

FACTS: Heller is a "D.C. special police officer authorized to carry a handgun while on duty at the Federal Judicial Center." Wanting to keep a handgun at home, he applied for a registration certificate. That request was denied by the District of Columbia. D.C. law prohibited the carrying of unregistered firearms, yet under D.C. law, the registration of handguns was prohibited. (Long guns could be registered, but must be kept either unloaded and disassembled, or with a trigger lock, while in residences.)[27]

[27] A separate, to some degree contradictory, ordinance permitted the police chief to issue a renewable handgun carry license.

Heller filed sued, arguing that the registration and prohibition on handguns within the home, and the requirement to keep long guns in a non-functional state, even in the home, violated the Second Amendment of the U.S. Bill of Rights.

The District Court dismissed his complaint, but the U.S. Circuit Court reversed, holding that the "Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right."

The District of Columbia requested certiorari, which was granted.

ISSUE: Is there an individual constitutional right to possess a firearm in one's home?

HOLDING: Yes

DISCUSSION: The U.S. Supreme Court reviewed the history of the Second Amendment, and the history of ownership of firearms, including handguns, in the United States. The Court also used amicus[28] briefs provided by historical linguistic experts in reaching its decision, to determine the usage of language at the time the Second Amendment. After extensive examination, the Court concluded that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation" - separate and apart from any membership in a militia. The court noted:

> … history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents.

The dissent claims that "for most of our history, the invalidity of Second-Amendment-based objections to firearms regulations has been well settled and uncontroversial" - but the majority stated "[f]or most of our history, the question did not present itself." The majority, however, agreed that the right to keep and bear arms was not unlimited, and upheld "longstanding prohibitions on the possession firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or law imposing conditions and qualifications on the commercial sale of arms."

Turning to the specific issue presented in this case, the Court found that "the inherent right of self-defense has been central to the Second Amendment right." The D.C. ban prohibited the precise type of weapon "overwhelmingly chosen by American society for that lawful purpose."

The Court concluded:

> Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of [the] Court to pronounce the Second Amendment extinct.

[28] Amicus curiae - "friend of the court" - are those briefs submitted by non-parties to a case to assist the court by offering specialized information about a particular point in a case.

The Court found the D.C. law to be unconstitutional, and ordered that the District "permit [Heller] to register his handgun and [to] issue him a license to carry it in the home."

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